FOR ARGUMENT

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Nos. 90-29, 90-38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. PLEDGER ..... *Appellant*

VS.

DANIEL L. MEDLOCK, ET. AL. ..... *Appellees*

CONSOLIDATED CASES

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

REPLY BRIEF ON THE MERITS BY APPELLANT IN DOCKET NO. 90-29

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I.

THE GREATER USE OF THE PUBLIC RIGHTS-OF-WAY BY CABLE TELEVISION ESTABLISHES SUFFICIENT GOVERNMENTAL INTEREST TO JUSTIFY DIFFERENTIAL TAX TREATMENT.

On page 11 of Appellees' Brief on the Merits, Appellees state that the State's imposition of its sales tax to charges for cable service, "while not subjecting charges for 'scrambled' satellite subscription service to the same Sales Taxes, is a clear violation of the taxpayer's First Amendment rights of free speech and free press that cannot be justified, in any way, because the cable operators make a greater use of the public rights-of-way than do other businesses engaged in the mass communications media."

As pointed out by Appellant in his Brief on the Merits in *Medlock v. Pledger* (Docket No. 90-38), the companion case to this case, cable television is not similarly situated to other media. Its use of and impact upon the public ways distinguishes it from all broadcast and print media. *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982). This distinction extends to satellite television service. The unique nature of cable television service is further described at pages 9 and 10 of the *amicus curiae* brief submitted by the City of New York, et al in Docket No. 90-38:

> "In order to gain access to its paying subscribers, cable operators must make substantial use of valuable public property. Coaxial cable must be hung from utility poles, housed in underground utility ducts or otherwise placed in or across the public rights-of-way. Furthermore, cable operators necessarily depend upon state and

> local authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) ('*Loretto*'). The grant of a cable franchise by a franchising authority carries with it the right to make the necessary use of public property and easements. Cable Act § 621(a)(2), 47 U.S.C. § 541(a)(2). Such grant allows the cable operator to obtain, at one time and at non-market clearing prices, all the necessary rights to reach that operator's subscribers — rights that are particularly valuable because they might otherwise be 'impossible to negotiate individually.' Brenner, 1988 Duke L. J. at 345-46. Furthermore, the grant of even a non-exclusive cable franchise by a franchising authority typically has the effect of according the cable operator a natural monopoly over the provision of cable services in its community." (footnote omitted)

As stated previously, the unique nature of cable television service justifies subjecting such service to Arkansas' general gross receipts (sales) tax, notwithstanding the fact that cable is entitled to some degree of First Amendment protection.

II.

LEGISLATIVE ACTION

Appellants have attempted to show that the Arkansas General Assembly, before this lawsuit, would seem to have had no reason to believe that there existed a gross receipt producing satellite television "descrambling" service in Arkansas which should have been given equal tax treatment

with cable television service. Appellant's discussion at page 15 of his brief of the testimony of Gail Price, Manager of the Sales and Use Tax Section of the Arkansas Department of Finance and Administration (Pet. App. E-1) was intended to draw a parallel between the state of knowledge about satellite television service at the Department of Finance and Administration and the subsequent adoption after trial by the General Assembly of Act 769 of 1989, which extended the sales tax to satellite television subscription service.

At page 16 of their Brief on the Merits, Appellees state:

> "The 76th Arkansas General Assembly met in 'special sessions' no less than four (4) times in 1987 and 1988 *after* this 'test' case was instituted to challenge the constitutionality of Act 188 of 1987." (footnote omitted)

These four "special sessions" (June 2-5, 1987; October 6-9, 1987; January 26-February 5, 1988; and July 11-14, 1988) all pre-date the date of the issuance of the trial court decision on March 10, 1989, and the date of the issuance of the decision of the Supreme Court of Arkansas on February 28, 1990. Therefore, it would be logical for the General Assembly to wait at least until the completion of the trial of this case to attempt to cure an alleged defect in the law.

CONCLUSION

For the reasons stated in this Brief and in his Brief on the Merits, Appellant respectfully requests that this Court reverse the judgment of the Supreme Court of Arkansas with regard to the constitutionality of Act 188 of 1987.

Respectfully submitted,

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